Solartec, Inc. and Sekely Industries, Inc. and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, Region 2B. Case 8-CA-31778-1

# April 11, 2008

# DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On August 23, 2007, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.<sup>3</sup>

## **ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Solartec, Inc. and Sekely Industries, Inc., a single employer, Salem, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Steven Wilson and Melanie Bordelois, Esqs., for the General Counsel.

Scott A. Lefelar, Esq., for the Employer. Bob Nece, Organizing Representative, for the Charging Party.

#### DECISION

# STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Cleveland, Ohio, on June 11, 2007. The

<sup>1</sup> On April 7, 2008, the Board granted the General Counsel's motion to sever the instant case from Cases 8–CA–31778, 8–CA–31943, 8–CA–32362, 8–CA–32427, 8–CA–32462, and 8–CA–33237, and remanded the severed cases to the Regional Director for further appropriate action

charge in Case 8-CA-31778-1 was filed by the UAW, Region 2B (the Union), on July 25, 2000. The charge in Case 8-CA-31857-1 was filed by the Union on August 31, 2000 and amended on May 4, 2001, and February 28, 2007. The Union filed Cases 8-CA-31943-1 and 8-CA-32362 on October 10. 2000, and April 23, 2001, respectively. The original charge in Case 8-CA-32427-1 was filed on May 22, 2001, and amended on June 14, 2001. The original charge in Case 8-CA-32462-1 was filed by the Union on June 1, 2001 and amended on August 29, 2001. The charge in Case 8-CA-33237-3 was filed by the Union on March 25, 2002. On February 28, 2007, the Regional Director for Region 8 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidating complaint and notice of hearing based upon the allegations contained in the above-identified charges. The consolidated complaint alleges that Solartec, Inc. and Sekely Industries, Inc. constitute a single employer. Based upon the parties' stipulation described below, both Solartec, Inc. and Sekely Industries, Inc. are referenced collectively as the Employer for this proceeding. The consolidated complaint further alleges that the Employer has engaged in various violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Employer filed a timely answer denying the alleged unfair labor practices.

Prior to the June 11, 2007 hearing, the parties entered into a settlement agreement resolving the 8(a)(1) allegations<sup>1</sup> contained in the February 28, 2007 consolidated complaint. The settlement agreement, providing for the posting of a Board notice, was approved by the Regional Director on June 6, 2007. Paragraph 35 of the consolidated complaint alleges that Chris Imburgia was unlawfully terminated by the Employer on or about July 21, 2000. On June 6, 2007, the Union requested a partial withdrawal of Case 8-CA-31778 as related only to consolidated complaint paragraph 35 and in conjunction with a non-Board settlement. Paragraph 39 of the consolidated complaint alleges the unlawful permanent layoff/termination of Robert (Pete) Lanzendorfer. Based upon the parties' non-Board settlement, the Union requested the partial withdrawal of Case 8-CA-33237-3 as it related to paragraph 39 of the consolidated complaint. On June 11, 2007, the Regional Director for Region 8 of the Board notified the Employer that he had approved the Union's partial withdrawal requests.

By virtue of the Regional Director's approval of the Union's partial withdrawals in Cases 8–CA–31778 and 8–CA–33237–3 and the Regional Director's approval of the informal settlement agreement resolving the consolidated complaint's 8(a)(1) allegations, only the allegations concerning the termination of Robert Stallsmith (as originally alleged in Case 8–CA–31857) remain in issue. Accordingly, counsel for the General Counsel moved to withdraw all complaint allegations that were resolved by a non-Board settlement or by an informal Board settlement of the parties. There being no objection from the Employer or the Union, counsel for the General Counsel's motion to withdraw the charges and allegations as enumerated was granted.

<sup>&</sup>lt;sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>&</sup>lt;sup>3</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>&</sup>lt;sup>1</sup> Specifically, the settlement agreement settles the allegations contained in pars. 6 through 33, 36, 37, and 38, and corresponding allegations in pars. 40, 41, and 42 of the consolidated complaint.

During the June 11, 2007 trial, the parties additionally submitted a joint stipulation in the interest of expediency and to avoid potentially unnecessary litigation. In order to preserve the Board's resources, the parties stipulated to defer the issue of whether the Employer is a single employer to the compliance stage of the proceeding.<sup>2</sup>

The Employer further stipulated that it terminated Stallsmith on or about July 10, 2000, because it believed that Stallsmith had engaged in activities on behalf of the Union and/or because Stallsmith supported the Union's organizing efforts among the Employer's Sekely Industries, Inc. employees at that time. The Employer asserts in the stipulation that it concluded that Stallsmith was a managerial employee, as defined by the Board and court precedent, and therefore not protected by the Act. The Employer further asserts that Stallsmith's union activities and support for the Union constituted disloyalty; which warranted his termination. Counsel for the General Counsel and the Union dispute that Stallsmith was a managerial employee at the time of his termination. It is undisputed that the Employer also terminated five other individuals in or about July 2000 for engaging in disloyalty toward the Employer by supporting the Union's organizing efforts and each of these individuals have been found to be a supervisory employee under Section 2(11) of the Act.

Accordingly, by virtue of the settlement agreements described above and the parties' stipulations, the only remaining issue is whether Stallsmith was a managerial employee at the time of his July 10, 2000 termination.

Prior to the hearing in this unfair labor practice proceeding, the parties agreed that a substantial portion of the hearing conducted in Cases 8–RC–16070 and 8–RC–16071 related to Stallsmith's duties and responsibilities. In an attempt to avoid repetition of testimony and duplication of exhibits, the parties jointly submitted the entire sworn testimony and all of the exhibits that constituted the record in the representation hearing in Cases 8–RC–16070 and 8–RC–16071. The parties further agreed to address in their posthearing briefs the specific portions of the representation proceeding upon which they respectively rely in this unfair labor practice proceeding. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and by the Employer, I make the following

# FINDINGS OF FACT

#### I. JURISDICTION

The Employer, an Ohio corporation, manufactures stamping dies for the automobile industry at its Salem, Ohio facility. Annually, the Employer sells and ships goods valued in excess of \$50,000 directly to points outside the State of Ohio. The

Employer admits that it<sup>3</sup> is engaged in commerce and also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find the Employer to be engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Procedural History

On May 25, 2000, the Union filed Cases 8-RC-16070 and 8-RC-16071 with Region 8 of the Board, seeking to represent all full-time production and maintenance employees of Solartec, Inc. and Sekely Industries, Inc., respectively. Beginning on July 28, 2000, and continuing on various dates thereafter until December 7, 2000,4 the Region conducted a hearing to resolve various issues related to the Union's petitions. Included in the issues<sup>5</sup> was the question of whether production leaders of Sekely Industries, Inc. and Solartec, Inc. are supervisors within the meaning of Section 2(11) of the Act. On February 14, 2001, the Regional Director for Region 8 of the Board issued a Decision and Direction of Elections involving both cases. Based upon the record evidence presented, the Regional Director found that production leaders are not statutory supervisors under Section 2(11) of the Act. The Regional Director also found that Sekely Industries, Inc. and Solartec, Inc. constitute a single employer. On March 9, 2001, the Employer filed its request for review of the Decision and Direction of Elections. On March 28, 2001, the Board denied the Employer's request for review.

On September 25, 2001, and in response to the Supreme Court's May 29, 2001 decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), in which the Court rejected the Board's previous interpretation of "independent judgment" as found in the Act's test for supervisory status, the Employer filed a motion for reconsideration of the Board's Order denying review of the Decision and Direction of Elections. In its November 14, 2001 Supplemental Decision, the Board remanded the proceeding to the Regional Director for Region 8 for further consideration and to reopen the record to take additional evidence on the issue of whether the Employer's production leaders "assign" and "responsibly direct" other employees and on the scope or degree of "independent judgment" used in the exercise of such authority.

Commencing on January 14, 2002, and continuing on various dates through February 20, 2002, a hearing was conducted to receive evidence in accordance with the Board's Order of November 14, 2001. At the conclusion of the hearing that generated a total transcript of 4230 pages of sworn testimony, the Regional Director issued a Supplemental Decision and Direction of Elections on August 12, 2002. In the Supplemental

<sup>&</sup>lt;sup>2</sup> Counsel for the General Counsel and the Union expressly reserve the right to allege, pursue, and litigate the single-employer issue, if necessary, at any compliance stage of this proceeding and the Employer stipulates to recognize that right. The Employer also expressly agrees that it will not raise the deferral of this single-employer issue as a defense to its pursuit of litigation at a later stage in this proceeding.

<sup>&</sup>lt;sup>3</sup> Although the issue of whether Solartec, Inc. and Sekely Industries, Inc. constitute a single employer is deferred to the compliance proceeding, the Employer admits that both entities are engaged in commerce.

<sup>&</sup>lt;sup>4</sup> There are 3031 transcript pages for this initial portion of the hearing.

<sup>&</sup>lt;sup>5</sup> The evidence also involved the issue of whether Solartec, Inc. and Sekely, Industries, Inc. constitute a single employer.

Decision, the Regional Director found that the evidence had not demonstrated that the die construction department leaders were supervisors under the Act.

On October 18, 2002, the Board granted the Employer's Request for Review. On September 28, 2006, the Board issued decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), in which the Board established new definitions of the terms "assign," "responsibility to direct," and "independent judgment." On January 4, 2007, the Regional Director for Region 8 issued a Second Supplemental Decision and Direction of Elections, finding the Sekely small machine department leader and the die construction department leaders to be supervisors as defined by Section 2(11) of the Act.

## B. Background

## 1. The Employer's operation

Founded in 1947, the Employer's facility manufactured<sup>6</sup> stamping dies for the North American automotive industry. The Employer's die construction department produced large automotive stamping dies for such parts as automotive fenders, hoods, as well as inner and outer doors. The individual automotive parts were created by moving a flat sheet metal stock or blank die through a sequence of different stamping presses. Die Construction Superintendent Homer Sanor testified in the representation hearing that the individual dies could weigh as much as 50,000 to 60,000 pounds and he estimated the value of a single die at approximately \$250,000.

In January 2000, James Randall Sekely, assumed the position as chief operating officer for the Employer's facility; after having previously served as vice president. After 6 months as the Employer's chief operating officer, Sekely became president of the Employer's operation.

## 2. Stallsmith's work background

Prior to Stallsmith's termination on July 10, 2000, he had been employed by the Employer for over 28 years. At the time of his discharge, Stallsmith worked as the large machine department leader on the first shift. He had held that position since March 1996 and was supervised by Large Machine Supervisor<sup>7</sup> Tom Furlong. Stallsmith estimated that at the time of his discharge, there were approximately 220 hourly employees and 15 to 20 office clerical, supervisory, and managerial employees at the Employer's facility.<sup>8</sup>

Stallsmith did not have an office. He had a workbench in the tool/grinding department where he repaired tooling. He also kept a toolbox at the south end of the building near the office area. Furlong, however, maintained an office in the upstairs area above the QC (quality control) room. Stallsmith estimated that he spent approximately 5 percent of his time with administrative responsibilities.

## C. The Issue of Stallsmith's Managerial Status

There is no dispute that the Employer terminated Stallsmith because he engaged in union activities and supported the Union's organizing efforts. The Employer argues that it terminated Stallsmith because of a concern that he would unjustly and improperly influence employees because of his support for the Union. While the protected status of other production leaders was resolved over the course of the above-described representation proceedings, Stallsmith's status as a supervisor or manager was not resolved.

The Employer asserts that Stallsmith was a managerial employee at the time of his discharge, and thus without the protection of the Act. Specifically, the Employer asserts that Stallsmith was a managerial employee because he (1) exercised plenary authority over the purchase and testing of hundreds of thousands of dollars of tooling and (2) served as the "right-hand man" of Machine Superintendent Tom Furlong and in that role was clearly aligned with management. Counsel for the General Counsel submits, however, that Stallsmith was not a managerial employee at the time of his discharge and was discriminatorily discharged because of his support for the Union.

#### D. Prevailing Law

Although the Act does not specifically address managerial employees, the Board has traditionally excluded these employees from the protection of the Act. Ford Motor Co., 66 NLRB 1317 (1946). In its 1974 decision in NLRB v. Bell Aerospace Co., Div. of Textron, Inc.,9 the Supreme Court addressed this category of employees; finding them to be excluded from the protection of the Act. Writing for the majority, Justice Powell acknowledged that the Act does not explicitly refer to managerial employees. He reasoned, however, that the Act's specific exclusion of supervisors evidenced Congress's general intent to also include managerial employees in an impliedly excluded group. Id. at 1766. As the Court has subsequently pointed out, the purpose of exempting managerial employees is to ensure "that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." NLRB v. Yeshiva University, 444 U.S. 672, 687-688 (1980).

The Board has defined "managerial employees" as those who formulate and effectuate management policies by expressing and making operative the decisions of their employers, and those who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). There is no dispute that the specific job title of the employee is not controlling. Whether an employee is "managerial" is determined by the employee's actual job responsibilities, authority, and relationship to management. 416 U.S. at 290.

## E. Stallsmith's Responsibilities for Purchasing and Related Functions

#### 1. Stallsmith's transportation of the stamping dies

Prior to Stallsmith's discharge, there were approximately 13 machines in the large machine department; the majority of

<sup>&</sup>lt;sup>6</sup> The Employer asserts in its posthearing brief that the Sekely Industries, Inc. facility closed in early 2007. The Employer's Solartec, Inc. facility has continued to operate.

<sup>&</sup>lt;sup>7</sup> Furlong's position is also referenced as superintendent.

<sup>&</sup>lt;sup>8</sup> Stallsmith was employed at the Employer's Sekely Industries, Inc. facility.

<sup>9 416</sup> U.S. 267 (1974).

which were computercontrolled. Stallsmith testified that by following a worksheet, he knew the jobs that were assigned to the various machines. Based upon that schedule, Stallsmith transported the various dies by "electric buggies" to and from the bay area to the designated machines in the department. He used one of the two hand-operated buggies to transport the smaller dies and he rode on the larger electric buggies to transport the heavier dies. Stallsmith explained that the major machine area ran from one end of the plant to the other and that he had some responsibility for all the machines in the major machine area. He routinely wore gloves to perform his work.

# 2. Stallsmith's direct work with the operators and specific machines

Stallsmith denied that he had any control over which machine was used for a specific die or that he had any responsibility for programming the machines or determining the operators for the machines. He testified that while he sometimes suggested tooling for a machine, he did not determine the machine feeds and speeds.

He also routinely assisted the operators in the department with positioning the dies on the machine tables for the various jobs. He assisted the operators with cleaning the dies and changing the angle plates when necessary. Stallsmith estimated that he spent approximately 10 percent of his time repairing end-caps and damaged tools. There were also cutters and other items in the department that were sent out for repair when they were damaged. Stallsmith asserted that Furlong decided when it was time to send the items out for repair. At Furlong's direction, Stallsmith prepared the orders for the repairs.

## 3. Stallsmith's purchasing responsibilities

The Employer argues that Stallsmith is a managerial employee by virtue of his duties as "tooling buyer." The extent to which he was involved in purchasing both routine and nonroutine items for the Employer received a great deal of attention in both the representation hearing as well as the underlying unfair labor practice proceeding. In its posthearing brief, the Employer argues that Stallsmith exercised substantial discretion and control over the Employer's tooling purchases, including meeting with tooling vendors, negotiating the price of tooling, evaluating the quality of vendors' tooling, and committing the Employer to substantial purchases with little oversight. The record evidence concerning his participation in such purchasing responsibility is described below.

# a. Meeting with vendors and outside sales representatives

Prior to May 2000, Stallsmith met with outside sales representatives who visited the plant. Stallsmith described the meetings with the sales representatives as unscheduled and casual. He recalled that during the visits, the sales representatives often gave him their product catalogs and discussed such personal matters as their golf games and their home remodeling projects. When he received the product catalogs, he filed them with other catalogs in a large filing cabinet. In May 2000, Sekely directed Stallsmith to discontinue meeting with the outside sales representatives and tooling vendors. Sekely testified that he did so because there was too much conversation and not enough work. Beginning in May 2000, Purchasing Agent Dale Metzger as-

sumed the responsibility for talking with the sales representatives who visited the plant and Stallsmith no longer had this responsibility or function. Stallsmith testified that after the middle of May or the first of June 2000, he no longer went to the lobby to greet the visiting salesmen.

## b. Stallsmith's role in purchasing nonroutine items

During the representation hearing, Stallsmith acknowledged that tooling salesmen normally submitted price quotes for their tooling to him. He identified a number of quotes for various tooling items submitted by different vendors. He explained, however, that it was necessary for him to review the quotes with Metzger because Metzger was aware of the prices that the Employer was currently paying and he was not.

The Employer asserts that Stallsmith's discretion in dealing with tooling salesmen is illustrated in his involvement in the Employer's purchase of a tool identified as a ball nose end mill. In April 1999, a sales representative told Stallsmith about this new tool or cutter that had the potential for cutting much faster than the tool that was currently used. Stallsmith testified that he showed the tool to Furlong and asked his opinion. Furlong agreed that it appeared to be a good cutter and suggested that Stallsmith test it. Stallsmith initially tested the tool himself on one machine and then asked an operator to run it on a different machine to test it at an even higher feed rate. Stallsmith testified that he did not recommend that the Employer purchase the tool. He recalled that Sekely observed the test and then told Furlong to obtain the tool for the shop. Sekely testified that he did not recall making the direct decision to purchase the ball nose end mill. He went on to explain that generally he did not involve himself in that much detail. He said that if the testing in the shop was successful and proved the productivity the Employer was seeking, there was authorization in the budget to purchase the product. In his testimony, Sekely did not confirm or deny that he had been present during the testing. Stallsmith recalled that Furlong told him the quoted price seemed expensive and he asked Stallsmith to see what price he could get. Stallsmith recalled that the Employer may have received a price reduction after he spoke with the vendor. Stallsmith denied, however, that he played any role in negotiating a price.

Stallsmith acknowledged that prior to May 2000, there were other occasions when the outside sales representatives offered their products to him for testing and for sales. He denied however, that he ever tested or purchased the products without consulting with Furlong. He testified that on occasion, he told Furlong that he believed that a particular product seemed "like a pretty good tool." Furlong did not always agree with him. When the sales representatives gave him price quotes on their products, he referred the quotes to either Furlong or Metzger. He recalled that there were occasions when Furlong asked him to try to get better prices on some of the inserts. He testified that his doing so was a part of his job and what he was instructed to do. He recalled that sometimes the sales representatives sent in a better quote to the office and sometimes they did not. He denied, however, that he ever became involved in any price haggling or continued discussions with the representatives about the specific prices.

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The Employer argues in its posthearing brief that if Stallsmith was satisfied with the testing of a new tool, he would purchase it. The Employer cites Stallsmith's testimony from the representation proceeding as an example of such decisional authority. Stallsmith's testimony, however, contradicts such absolute authority.

Stallsmith recalled that he was present with operator Al Rogers when he tested a tool identified as a Sandvik drilling end mill. When the Employer's counsel asked Stallsmith what he thought of the tool that was tested, Stallsmith replied: "Good tool." Stallsmith did not deny that he had been the individual who had prepared the purchase requisition for the new tool. During the representation hearing, Stallsmith identified a number of purchase requisition orders that he had prepared. Stallsmith explained, however, that if the department needed tooling or tool bodies, he notified Furlong. Based upon Furlong's directive, Stallsmith prepared the requisition form to order the tools. He explained that while he prepared requisition orders, he did so because he was instructed to do so. 10 He recalled only one occasion when he prepared a requisition form without first consulting with Furlong and this was for his personal purchase of a gun safe. Stallsmith testified that while he also prepared orders to send items out for repair, he did so at Furlong's direction.

## c. Stallsmith's role in purchasing routine items

One of Stallsmith's responsibilities was to maintain an inventory of carbide inserts for the department. He estimated that there are hundreds of different inserts that are used to cut the metals in the die manufacturing process. Stallsmith explained that normally purchase requisitions were not used for ordering tooling. The tooling was ordered by using the machine inventory book, also known as the blanket order book. Because Stallsmith was responsible for ordering the inserts, he used the blanket order book to do so. The book, maintained in the tool grinding department, consisted of a loose-leaf ringed binder containing lists of parts that were regularly ordered in the large machine department. There is no dispute that Stallsmith continued to place orders using the blank order book even after he no longer met with the outside sales representatives who visited the facility. When filling out an order sheet, Stallsmith indicated the date of the inventory and the number of listed parts that were needed. He estimated that he spent about 10 to 15 minutes each week completing the blanket order book. Once he had marked the items that he wished to order, he gave the book to the tool grinder to place his order for parts as well. Once Stallsmith and the tool grinder marked the items they wished to order, Stallsmith gave the book to Furlong for his review. From Furlong, the order list went to Metzger.

During the representation hearing, the Union submitted into evidence a copy of a document relating to the Employer's blanket order book. During the unfair labor practice hearing, Sekely explained the information contained therein. The document contained a list of blanket order numbers for specific vendors and the services or items that were covered by each

blanket order number. The document also includes the name or names of individuals employed by the Employer who were authorized for purchases for each blanket order number. Sekely testified that the Employer maintained an outstanding purchase order with the vendors that were listed on the blank order forms. He explained that the named managers and employees listed on the blanket order forms were authorized to call the vendors and place orders for the commodities listed on the form without having to prepare a written purchase order. The document reflects that only Furlong and Metzger were shown to have such authorization for ordering the carbide inserts. Stallsmith is not listed as having such purchasing authority for the carbide inserts or for any other items.

Stallsmith recalled that "a couple of times" Furlong suggested that he not order as many inserts because the department was getting close to the budget for the month. During the representation hearing, Controller Jeff Musleve testified that Furlong and Stallsmith had been present for an October 1999 meeting concerning the budget for the large machine department. In later testimony, however, he was asked to identify all of the individuals who were present for the meeting. He identified a number of individuals and explained that he "believed" that Stallsmith was present because he "handled the mill tooling." Stallsmith, however, testified that he was unaware of the amount of the department's budget. He further denied that he ever attended any meetings in which the department budget was discussed or determined.

#### d. The monetary value of Stallsmith's purchases

The Employer submitted into evidence a copy of its budget detail report for 1999. The report contained the names of suppliers from whom the Employer purchased inserts and the document reflects a total expense of over \$108,000. Stallsmith testified that while the supplier names, the quantities, and the frequency of purchases appeared to be correct, he had no knowledge of the Employer's budget for such items and could not verify the total expense.

In reviewing other budget detail reports, Stallsmith also identified other suppliers and purchase items for which he had submitted requisitions to Furlong in 1999. Stallsmith acknowledged that Furlong routinely approved the requisitions if there was money available in the monthly budget. In his posthearing brief, counsel for the Employer points out a particular section of Stallsmith's testimony in which he testified that he could not recall a case in which Furlong ever failed to approve his requisitions for tooling. Stallsmith continued his testimony, however, by further explaining that he usually spoke with Furlong before he actually submitted the requisition and therefore he knew in advance as to whether to submit the requisition. He recalled that Furlong either told him that he should hold up in submitting the requisition or Furlong told him to go ahead and submit the requisition.

Citing specific testimony in the representation hearing, the Employer argues that there was a separate budget for experimental tooling and that Stallsmith selected the tools to purchase. During the hearing, Stallsmith denied any knowledge as to whether the Employer had an annual budget of \$8000 for experimental tooling. Stallsmith recalled an occasion when a

<sup>&</sup>lt;sup>10</sup> He continued to submit purchase requisition orders even after he no longer met with the sales representatives who visited the facility.

vendor left a cutter that would also perform as an end mill. Stallsmith testified that he took the tool to an operator and told him: "I think we ought to try this tool on the heels because you don't have anything to reach it." The operator agreed. Stallsmith did not tell him what feeds or speeds to use with the tool. On another occasion, a vendor asked him to try out a particular insert as a substitution for another insert. Stallsmith denied that he requisitioned the inserts using the experimental tool budget. He recalled that the salesman came into the facility with the inserts and remained until 8 p.m. on the evening shift while the operators used the new inserts. Stallsmith left at the end of his shift. Stallsmith testified that the salesman later argued that he had stayed at the facility for 8 or 9 hours and he should at least be paid for the inserts. Stallsmith asked Furlong and he directed Stallsmith to prepare an order for the experimental inserts.

# F. Did Stallsmith's Purchasing and Related Responsibilities Establish Managerial Status

As the Board has pointed out, the fact that employees may exercise some discretion in carrying out their responsibilities and do not work under close immediate supervision does not compel a finding that the employees are managerial. The determination of an employee's "managerial" status depends upon the extent of the exercise of his discretion. The routine performance by an employee of largely predetermined policies does not warrant finding him to be a managerial employee. *Kitsap County Automobile Dealers Assn.*, 124 NLRB 933, 934 (1959).

As has been recognized by the Board and the courts, an employee's exercise of discretion is not a touchstone of managerial authority if the employee's actions must conform to the employer's established policy. Eastern Camera & Photo Corp., 140 NLRB 569, 571 (1963); and Retail Clerks International Assn. v. NLRB, 366 F.2d 642, 645 (D.C. Cir. 1966). As the Supreme Court specifically noted in NLRB v. Yeshiva University, supra, 444 U.S. at 683, a managerial employee must "exercise discretion within, or even independently of, established employer policy and must be aligned with management." The Court went on to note that even though the Board had not established a firm criteria for determining when an employee is so aligned, an employee is normally only excluded as managerial when the employee represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. Ibid.

Even when an employer may consult with an employee prior to purchasing major machinery or when the employee can pledge the employer's credit for nonroutine items, the employee's advice may be viewed as no more than that of a knowledgeable employee and his purchases may be a routine part of his duty to maintain a supply inventory. Such actions have not been found to be conclusive of independent judgment or the exercise of independent discretion, indicative of managerial status. Sampson Steel & Supply, 289 NLRB 481, 482

(1988); and Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970).

Although an employee may have the authority to recommend various types of action by the employer with respect to the use and purchase of equipment and machinery, such authority does not always evidence the employee's discretion or authority to make the ultimate determination, independent of the employer's consideration and approval. *Iowa Southern Utilities Co.*, 207 NLRB 341, 345 (1973). In fact, in *Iowa Southern Utilities Co.* the employee in issue prepared specifications for equipment to be purchased, reviewed conformity with the specifications upon completion of the contract, and submitted recommendations that led to the employer's financial outlay. Such authority, however, was not found to be sufficient to exclude the employee from the protection of the Act as a managerial employee. Id. at 345.

The Employer asserts that Stallsmith operated with independence and autonomy in negotiating tooling prices with the vendors. The Employer specifically points to Stallsmith's testimony in 2000 when he was asked if he had negotiated a better price on a particular insert and end mill. Stallsmith simply answered: "Yes." Stallsmith went on to explain in his testimony, however, that part of his job was to find better prices. During the unfair labor practice proceeding, Stallsmith explained that when Furlong told him that the vendor's price was expensive and to see what he could do, he asked the vendor for a better price. Stallsmith explained that the sales representatives sometimes submitted a better quote to the office and sometimes they did not. He denied that he engaged in further haggling or debate with the representatives about reducing the price. Stallsmith confirmed that there were never any occasions when he rejected a supplemental price quote from a vendor. He recalled that when he received a verbal quote from the sales representative, he communicated the quote to Furlong. Written quotes were forwarded to Furlong or the office. It has been found that even where an employee may solicit estimates from outside suppliers in collecting data for cost estimates, such action has not been found sufficient to establish managerial status. Case Corp., 304 NLRB 939, 949 (1991), enfd. 995 F.2d 700 (7th Cir. 1993).

In the Board's decision in Washington Post Co., 254 NLRB 168, 189 (1981), an assistant purchasing manager was not found to be a managerial employee although half the employee's time was devoted to determining the need for stock items and ordering such items. The assistant purchasing manager usually solicited three bids from vendors, and then, using price and quality guidelines, selected the most appropriate vendor for the employer. The total of the inventory under the control of the assistant manager approximated \$500,000 and the monthly authorization for purchases ranged from \$25,000 to \$50,000. The Board concluded that while the assistant manager was able to commit the employer to purchasing stock items, the assistant manager must nevertheless conform to certain employer guidelines and, on occasion, must clear decisions with higher department or company authorities. Thus, the ordering of supplies and repairs is not the "pledging of employer credit" that inevitably constitutes managerial authority. Additionally, the employee's selection of repair services or training was not

<sup>&</sup>lt;sup>11</sup> American Federation of Labor-Congress of Industrial Organizations, 120 NLRB 969, 972 (1958).

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indicative of independent discretion or actions outside the employer's guidelines sufficient to convert an otherwise rank and file employee to a management employee.

The Employer asserts that the overall record demonstrates that Stallsmith acted independently in meeting with tooling vendors, negotiating the price of tooling, evaluating the quality of the vendors' tooling, and committing the Employer to substantial purchases with little oversight. Citing Concepts & Designs, Inc., 318 NLRB 948 (1995), the Employer argues that under almost identical facts, the Board found such buyer functions to be indicative of an employee's managerial status. The Employer is correct in that the Board in Concepts & Designs, Inc. found an employee whose duties involved purchasing responsibility for a third of her time to be exempt as a managerial employee. The Board affirmed the judge in finding that the manner in which she exercised her purchasing authority, the extent of unreviewed discretion that she exercised, and the magnitude of its impact on the employer's overall business established that she was more than simply a buyer performing routine duties.

Unlike Stallsmith, however, the purchasing employee in issue in *Concepts & Designs, Inc.* had the discretion and authority to change vendors in order to obtain better prices or if the current vendors were not meeting their delivery obligations. She had the authority to evaluate the quality of parts and could select a particular vendor based upon that evaluation. Her discretion in performing her duties was not ordinarily reviewed by any company official. She was the only company representative to meet with vendors. During the prior year, the employee purchased approximately \$2 million in items or services. The judge noted that an employee's ability to commit an employer's credit in amounts which are substantial, especially where done through exercise of discretion which is not ordinarily reviewed, is strong evidence of managerial status.

In comparing the facts of *Concepts & Design, Inc.* and the current case, I do not find a significant correlation. Admittedly, Stallsmith was often given the responsibility to solicit better prices for various tooling items from the Employer's vendors. There is no evidence, however, that he had any personal responsibility for choosing vendors or for rejecting vendors because of their prices or any other reasons. While he testified that he successfully obtained better prices when he spoke with vendors, there is no evidence to contradict his testimony that he did so at Furlong's direction. Additionally, while Furlong may have normally approved the purchase requisitions submitted by Stallsmith, there is no evidence to contradict Stallsmith's testimony that he consulted with Furlong prior to the submission.

In its posthearing brief, the Employer also cites the Board's decision in *Kearney & Trecker Corp.*, 121 NLRB 817, 822 (1958), involving buyers who interviewed prospective suppliers and effectuated purchases of machine parts. Because they also had the authority to place orders with alternative suppliers if deliveries were not made on time, they were found to be managerial employees. Additionally, the Employer cites the Board's early decision in *Mack Trucks, Inc.*, 116 NLRB 1576, 1578 (1956), in which buyers were excluded from a bargaining unit because they had authority to negotiate prices, change delivery dates, and adjust disputes with suppliers over rejected items.

The Board reasoned similarly in its decision in *Aeronca, Inc.*, 221 NLRB 326, 328 (1975), where an estimator was found to be a managerial employee. The estimator was instrumental in setting prices and negotiating contracts with the employer's customers. In fact, the estimator was given the monetary figure that the company expected to negotiate with the Union. Additionally, the estimator met with the director of industrial relations in order to compare notes on anticipated wage increases that would affect the cost of the employer's product.

The kind of discretion and alignment with management in the cases discussed above is clearly dissimilar to the responsibility given to Stallsmith. The evidence in this case reflects that Stallsmith often served as a conduit for vendors to introduce their new products. Conversely, Stallsmith's job also included soliciting better prices from vendors and physically requisitioning tooling from the various vendors. The record does not reflect, however, that Stallsmith possessed any authority to reject or to change suppliers because they were unable to make timely deliveries or to adjust disputes with suppliers over rejected items. Clearly, this kind of interaction with the vendors was the responsibility of Furlong, if not Metzger.

Stallsmith's purchasing authority and responsibility might better be compared with a systems/pagination coordinator who was not found by the Board to be a managerial employee in Bakersfield Californian, 316 NLRB 1211, 1214-1215 (1995). As a computer specialist, the coordinator researched and made recommendations concerning the purchase of systems hardware and software in addition to assuring proper installation. She handled trouble shooting and also developed and implemented the prepress computer system policies. She monitored the system and instructed and trained employees on the system. She submitted requisitions for computer equipment and her requests were invariably granted. She could return equipment to the vendors without checking with the manager. She evaluated and recommended the purchase of certain systems' equipment. While the Board noted that her job required technical skill and expertise, it did not involve formulating policy or acting independently of the employer's established policy. She did not regularly resolve managerial problems nor did she formulate, determine, or oversee employer policy or act independently of established policy to any meaningful degree.

In International Transportation Service, 344 NLRB 279, 292 (2005), only the alleged managerial employee and her supervisor had the authority to order modifications to the employer's software program and to contract with the employer's outside contractors for those modifications. Such modifications resulted in more than \$23,000 in payments to the outside contractors. Because the employee was the person most familiar with the payroll software program, it was reasonable that she could authorize the contractors to perform modifications or correct observable flaws. Her authorization for the expenditure of funds for work on the program was not found to be independent of established employer policy. Rather, it was found to be routine operating procedure under the employer's established policy to allow her to authorize such work on its software program. Her authority is not really that much different from that exercised by Stallsmith. Because he was the person most familiar with all of the machines and their tooling needs, it is

reasonable that he was the person who requisitioned the tooling products from the vendors and functioned as the conduit through which the vendors presented their new products to the Employer.

There is no question that Stallsmith was responsible for maintaining an inventory of inserts for the large machine department and for requisitioning other tooling products that might be needed by the machinists in the department. Clearly, Stallsmith used the blanket order book to initiate orders for the carbide inserts. As the Employer's records indicate, however, he was not designated to actually call a vendor and place an order for the inserts without having a formal written purchase order. Only Furlong and Metzger had such authority. Stallsmith credibly testified that once he and the tool grinder submitted their proposed order in the blanket order book, the order was submitted to Furlong and then to Metzger for review. While this very protracted record contains numerous requisition orders prepared by Stallsmith, Stallsmith does not deny his role in their preparation. He readily admits that he was actively involved in requisitioning various tooling products for the department. He maintains, however, that he did so only at Furlong's instruction and with prior consultation with Furlong. His testimony was not contradicted. Neither Furlong nor Metzger testified in either the very long representation case or in the unfair labor practice proceeding. Although the Employer's controller initially placed Stallsmith at a budget meeting in 1999, he later testified that he "believed" that Stallsmith was present because of his involvement in purchasing tooling. Stallsmith credibly testified that he was not involved in any such meeting and that he had no knowledge of the Employer's budget for the large machine department. He relied upon Furlong to keep him within budget guidelines.

Thus, there is nothing in the record to indicate that Stallsmith's purchases are independent of the Employer's established policies rather than essential to maintaining an operational status quo. Even if Stallsmith could pledge the Employer's credit or effectively recommend the purchase of tooling, his recommendations are those of a knowledgeable employee and his purchases are a routine part of his responsibility to maintain a tooling inventory. *Sampson Steel & Supply*, 289 NLRB 481, 482 (1988). Accordingly, I do not find Stallsmith's purchasing authority, responsibility, or duties sufficient to establish managerial status.

## G. The Issue of Stallsmith's Alignment with Management

# 1. The June 2000 job description

Stallsmith testified that in June 2000, the employer presented him with a document entitled "Sekely Industries, Inc. Job Description." The document was captioned "Major Machine Supervisor" and included a job summary as well as a listing of job duties and responsibilities. The document was given to Stallsmith in a meeting with Stuart Keene, the Employer's labor consultant. Sekely joined Stallsmith and Keene during the course of the meeting. Keene asked Stallsmith to review the document and to sign the document if he agreed with it. Stallsmith, who had never previously seen this document, did not agree with the document and objected to signing it. He also tape recorded the meeting with Keene and the tape recording

was played into the record during the representation proceeding.

During the meeting, Keene told Stallsmith that some of his duties had always been a part of management. Stallsmith questioned why it was advantageous for him to be considered as a part of management at that time when it had not been advantageous in the past. Stallsmith also questioned the legality of the Employer's changing his job description at that particular time from leader to supervisor.

Stallsmith argued that he performed physical work and he did not oversee evaluations or make recommendations for raises or discipline. When Stallsmith argued that he was a leader and not a supervisor, Keene asserted that the dictionary definition of leader is actually "supervisor." When Stallsmith pointed out that he had never received a bonus, Keene responded: "You will," and explained that the Employer had "just made the change." Stallsmith again argued that while he did some of the jobs listed in the job description, he did not recommend raises.

Keene explained that Furlong's title had been changed to machine superintendent and Stallsmith's job was now changed from leader to machine supervisor. When Stallsmith questioned the reason for such a change at that time, Keene simply explained that it had been done in order that the description would better reflect "what people are doing." When Stallsmith questioned what had happened to his previous job description for his position as leader, Keene replied that it had "gone by the wayside."

While Stallsmith argued that he did not know that he could accept the title as supervisor, he acknowledged that he performed the duties described on the document. Keene asserted that the Employer had plans that were very positive for him and for all the supervisors. Stallsmith asserted that plans for him would have to be very far reaching because he wanted to keep his job and not have someone tell him to "hit the road." Even though Keene assured him not to worry about the change, Stallsmith nevertheless asserted that he was concerned with the fact that suddenly his job title had changed. Keene then admitted that the Employer had prepared the job description in order that the Employer did not get "caught" with his being a leader and to clarify that he was performing supervisory duties under Section 2(11) of the Act. Reluctantly, Stallsmith agreed to sign the document under protest. Several days later, the Employer asked Stallsmith to sign the job description again in the presence of a notary. Stallsmith declined to do so. Stallsmith told the notary that he did not have legal counsel present. He also added that the flag of the United States guaranteed him the right to vote and the Employer was denying him that right.

## 2. The duties included in the job description

## a. Assignment of jobs

The first job duty and responsibility listed on the June 2000 job description includes the following responsibility: "Assign job tasks to machinists appropriate to the employee's skill level and directs them according to the manufacturing needs and priorities using independent judgment." Stallsmith testified that while he assigned job duties, it was only after his receiving notice of the job duties from his supervisor. Stallsmith ac-

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knowledged that he walked through the machine area to see if there were problems and if the machinists were performing the jobs correctly. If a machinist was using the wrong tool, he suggested he use a different tool. He denied that he ever instructed a machinist to change tools. If a machinist needed a different tool and did not have it, Stallsmith got it for him from the toolcrib. An additional duty shown in paragraph one of the document is the requirement to execute a daily lineup for both the computerized and conventional machines. Stallsmith asserted that while he received a daily lineup from Furlong, he did not create the daily lineup.

Stallsmith testified that Furlong made the assignments of the various jobs to the individual machines. He denied that he had any role in assigning machinists according to their skills or manufacturing needs and priorities as specified in the job description. During the representation hearing, machinist Keith Speerhas testified that there were occasions when Stallsmith brought him new jobs. He testified that he would not have felt comfortable telling Stallsmith that he did not want to do the job or that he wanted another job. He explained, however, that he would not have objected because any job that Stallsmith would have brought him would have been one that was on the lineup sheet.

Stallsmith explained that while he might occasionally offer suggestions or recommendations to Furlong concerning the job lineup, Furlong sometimes listened and sometimes did not listen. When Furlong was on vacation, Die Construction Superintendent Sanor determined the priorities of the jobs in the department. If there were two machines opened at the same time and only one job, Stallsmith consulted Sanor as to which machine would be used. There were occasions when he had to change the lineup on a particular job when Furlong was in a meeting or unavailable. Stallsmith acknowledged that there have been times when he has asked a machinist to stop what he is doing in order to help another machinist with a particular job.

#### b. Evaluation of employee's work

Item nine of the job description includes the responsibility to provide input on employee performance reviews and to recommend employee merit increases and job classification changes. Stallsmith denied that he ever reviewed other employees or evaluated their work performance for a report to Furlong. He recalled that there were occasions when Furlong informally asked for his input, but not in conjunction with Furlong's preparation of written employee evaluations. Stallsmith acknowledged that if Furlong asked for his opinion about whether someone should receive a raise, he always agreed. He never told Furlong, "No." Stallsmith initially denied that he ever recommended anyone for a promotion and he never recommended that anyone be denied a promotion. On crossexamination, Stallsmith was asked if he had recommended promotions for two specific machinists. He testified that they were both very good machinists and he acknowledged that he may have made a recommendation. He also acknowledged that had he been asked about giving a raise to another identified machinist, he would probably have recommended against it. He had not recalled, however, as to whether any such input was ever requested from him.

Stallsmith testified that he reported production problems and forwarded work improvement suggestions to Furlong. If a machinist was going too slowly, Stallsmith would suggest that he move a little faster. There were occasions when he suggested to machinists to change the speed or feed on their machines. Occasionally, he would also tell Furlong if the machinist failed to follow his suggestion. In those instances when it was quite obvious that a machinist was running a job too slow or "milking it," he reported such to Furlong. Stallsmith testified that he would probably tell Furlong that a machinist was "milking it" and ask Furlong if the machinist could run it any faster. He explained: "It didn't do me any good to say anything to many operators there, they didn't listen to anything I said."

# c. Discipline of employees

Item 10 of the description provides that the supervisor recommend disciplinary action regarding employee performance issues or other violations of company rules or policies. Stallsmith denied that he had ever disciplined another employee. He admitted that he told Furlong that an employee should be fired after the employee badly damaged a bridge mill. Stallsmith explained, however, that almost everyone in the shop made similar comments to Furlong. The employee who damaged the bridge mill was not terminated and there is no evidence that he was given any discipline.

## d. Direction and training of newly hired machinists

Item 6 of the description provides that the supervisor will direct and train newly hired machinists. The supervisor is also required to monitor and evaluate the results of their work and report the work results to the supervisor as appropriate. Stallsmith testified that there had been no new machinists hired into his area since he had been a leader on first shift. He denied that he had ever monitored and evaluated the results of newly hired machinists.

# e. Authorization of employee work hours

Item 8 of the job description provides that the supervisor review and authorize employee work hours and job codes on the Employer's daily time processing report. Stallsmith confirmed that only in Furlong's absence did he ever have occasion to perform this responsibility. He estimated that it occurred approximately 3 weeks each year and only while Furlong was on vacation.

## H. Whether Stallsmith was Furlong's Right-Hand Man

In *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980), the Court noted that under Board policy, an employee may normally be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. The Employer asserts that Stallsmith was a managerial employee because he was aligned with management as Furlong's "right-hand man." In its argument that Stallsmith was Furlong's "right-hand man," the Employer relies primarily upon two areas of testimony: (1) Stallsmith's testimony concerning the June 2000 job description and (2) the testimony of a machinist James C. Boals concerning how other employees per-

ceived Stallsmith's authority. As discussed below, neither area substantiates a finding of Stallsmith's managerial status.

## 1. The June 2000 job description

The Employer argues that a compelling piece of evidence establishing Stallsmith's authority is the job description that he signed in June 2000. The Employer specifically focuses on the description's duties that include work assignment, direction of work, monitoring and evaluation of work, input concerning employee performance, and the recommendation of disciplinary action.

During the June 11, 2007 cross-examination of Stallsmith, the Employer's counsel directed Stallsmith to portions of his previous testimony on September 28, 2000, and to portions of his tape recorded conversation with Keene in June 2000. Stallsmith acknowledged that during his conversation with Keene and Sekely, he stated that he performed the duties included in the job description. During cross-examination on June 11, 2007, Stallsmith was also asked about a deposition that he had given in a private lawsuit in 2001. Stallsmith admitted that during the 2001 deposition, he acknowledged his previous testimony during the 2000 representation hearing. The Employer asserts that Stallsmith's responses to Keene and Sekely as well as his subsequent sworn testimony indicates that Stallsmith did, in fact, perform the duties and exercise the authority set forth in the job description. I do not find, however, that the entire record supports this premise.

First, whatever Stallsmith told Keene and Sekely about his duties is less persuasive than the overall evidence of his actual duties and responsibilities. As counsel for the General Counsel pointed out in his brief, the circumstances of Stallsmith's June 2000 meeting with Keene and Sekely belies the assertion that Stallsmith willingly acknowledged all of the duties and authority outlined in the job description. During the meeting, Stallsmith argued that he performed physical work and he asserted that he did not oversee evaluations or make recommendations for raises or discipline. He questioned not only the legality of the Employer's attempt to convert his job to supervisor, but he also questioned the timing of the Employer's action. As evidenced by the tape recording, Stallsmith pointed out that while he did some of the jobs listed, he did not have all of the authority included in the job description. Stallsmith told Keene and Sekely that he wanted to keep his job and he did not want to be terminated. With continued pressure from the Employer, however, Stallsmith reluctantly signed the job description. It is quite apparent that Stallsmith was not only uncomfortable with this meeting, but also fearful of losing his job. The fact that he felt a need to tape record the conversation indicates his apparent apprehension in participating in this meeting. Therefore, it is not surprising that he agreed that he performed the duties listed in the description and that he felt compelled to sign the description. The Employer argues that Stallsmith acknowledged that he had time to read the job description and understood it before signing it. The fact that he read it and even understood it does not negate his signing it under apparent duress.

When Sekely asked Stallsmith if those were his duties as a supervisor, Stallsmith simply responded: "I do the duties." During the tape recorded conversation, Stallsmith also confirmed that he did "the tasks" and he did the "work." There is no portion of the recorded conversation in which Stallsmith actually acknowledged that he had the authority to assign jobs using independent judgment, evaluate employee's work, participate in employee reviews, recommend employee merit increases and job classification changes, or to recommend disciplinary action for employees. Thus, while Stallsmith agreed with Keene and Sekely that he performed some of the listed tasks and work assignments, he did not confirm that he had the broad authority and responsibility included in this self-serving job description, which was apparently prepared by the Employer in response to the Union's organizational activity and the Union's May 25, 2000 petition to represent the Employer's employees. Additionally, there is no dispute that Keene told Stallsmith that he was being asked to sign the job description in order to designate him as a supervisor under Section 2(11) of

## 2. Stallsmith's performance of the alleged duties

Focusing on Stallsmith's testimony, the Employer asserts that Stallsmith admits to performing many of the jobs contained in the 2000 job description. Specifically, the Employer argues that Stallsmith admits to policing machinists' work and reporting such to Furlong "when a machinist's pace of work was not to his liking." The record reflects, however, that Stallsmith testified that he seldom told the machinists to pick up the pace of their work. He explained that he was more likely to tell Furlong that a machinist was "milking" the job and to ask Furlong if the machinist could run a job any faster. He went on to explain that it did not do him any good to say anything to the operators because they did not listen to anything that he said.

The Employer also argues that Stallsmith admitted to recommending the discharge of a machinist after the machinist badly damaged a bridge mill. Stallsmith testified, however, that almost everyone else in the shop also recommended the termination of the machinist. Additionally, there is no evidence that the machinist in question was ever disciplined.

In the posthearing brief, the Employer further asserts that Stallsmith admitted that he recommended a promotion for two of the employees in the department. During the 2000 hearing, Stallsmith testified that while Furlong sometimes asks him about how individual machinists were doing, they never talked directly about an employee's potential raise. Additionally, he acknowledged that there were two machinists who were very good and that he may have recommended to Furlong that they be promoted. Inasmuch as Furlong did not testify, there is no evidence as to the extent to which Furlong may have considered Stallsmith's recommendation. In response to a question on cross-examination, Stallsmith could not recollect that Furlong had ever asked his opinion about giving a raise to a particular employee on second shift. Stallsmith candidly testified, however, that had he been asked, he would probably not have encouraged it.

The Employer submits that Stallsmith's testimony indicates that he "roamed" the large machine department and policed the machinists' performance and use of tooling. There is no question that Stallsmith spent a significant amount of time in the work area assisting and communicating with the machinists.

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Because he was responsible for keeping an inventory of inserts and other tooling, it was common practice for him to check the machines to see if an excessive number of inserts were accumulating at the individual machines. If he found that to be the case, he redistributed the inserts. If he saw that a machinist was using an excessive number of inserts, he would try to find the problem. If he saw that a machinist was using the wrong size end mill or the wrong blade, he would suggest a change. Based upon the worksheet and the job, Stallsmith would normally anticipate the tools that would be needed by the machinists. If he saw that a machinist was using the wrong tool, he would ask him if he could use a different tool that might work better. If he saw that the machinist did not have the tool that he needed, he would get it for him from the toolcrib. He denied that he ever ordered a machinist to change his tool. If he thought that the machinist was running the machine too fast, he would suggest a slower pace. Thus, he readily acknowledged that he regularly observed the operation of the machines and made suggestions to the machinists for more efficient and effective operation. The evidence, however, does not support a finding that his observation and suggestions constituted an evaluation or monitoring of work performance dispositive of managerial status. Further, while Stallsmith may have offered his personal opinions on employee performance to Furlong, there is no evidence that Furlong ever acted on them or even considered them.

# 3. Whether employees perceived Stallsmith as aligned with management

During the unfair labor practice proceeding, the Employer presented the testimony of machinist James C. Boals. When asked to describe Stallsmith's daily duties, Boals explained that Stallsmith was the person the machinists went to if they needed inserts or other items. Stallsmith also assisted in helping the machinists "take jobs on and off." Boals further described Stallsmith as the man who took care of the tooling, ordered tools for the machinists, and obtained such materials as clamps, bolts, and nuts that were needed by the machinists. Stallsmith ate lunch with Boals and the other machinists. Furlong did not.

Boals testified that Stallsmith was Furlong's "right-hand man" and that he and most of the other machinists always did what Stallsmith said because he "was supposed to be the guy in charge." Boals confirmed that Stallsmith sometimes questioned why a machinist was using certain tooling and would often suggest different tooling for a job. He recalled that when Stallsmith told him that he should be using a short cutter, he told Stallsmith to get him one and he would use it. He went on to explain that if Stallsmith questioned his using the wrong size cutter. Stallsmith would also help him find the right size cutter or "they" would try a different tool. He recalled that during one of their lunch conversations, Stallsmith told one of the other machinists that he was taking too long to run a particular job. In describing Stallsmith's conversation with the machinists during lunch, Boals testified: ". . . we talked about that crap at lunch, we'd make fun of each other, you know, and do that stuff." Boals remembered that there had been occasions when Stallsmith had also told him that he needed to slow the machine or to try a different speed. Boals testified that when Stallsmith asked him to do so, he slowed the machine. He explained that because Stallsmith had more years of experience, he followed Stallsmith's suggestions and did what he suggested. Boals testified that he was afraid that he would get in trouble if he refused to do what Stallsmith requested. He went on to explain however, that he was afraid of getting in trouble because he did not want to cost the company excess money. Boals testified that he had been concerned that he would be "pulled out on the carpet" by Furlong if he had run the machine incorrectly and it had cost the company money. When asked by the Employer's counsel as to how Furlong would find out about such a mistake, Boals speculated that Stallsmith might tell Furlong. He presented no evidence, however, to substantiate that he had ever been disciplined or reprimanded because of Stallsmith's report to Furlong.

Although Boals testified that Stallsmith was the "man in charge," he also acknowledged that Stallsmith maintained contact with Furlong by personally speaking with him and by using a two-way radio. Boals recalled an incident in which he was experiencing a problem with his machine. Stallsmith called Furlong and told him that he might want to look at the machine and see if there was anything that Furlong wanted to change and to see what action Furlong wanted to take. Furlong then came to Boals' work area and personally checked out the machine

I do not find that Boals' overall testimony demonstrates Stallsmith's managerial status. While he broadly described Stallsmith as Furlong's right-hand man and the guy "who was supposed to be in charge," his testimony concerning Stallsmith's day-to-day interaction with him and the other machinists is not indicative of managerial status. It is apparent that Stallsmith worked closely with the machinists to make sure that they had the necessary tooling to do their jobs correctly. Additionally, it is not disputed that if he saw a problem in the production, he suggested ways that they could perform their work with greater efficiency and more cost effectively. Such interaction, however, does not show the requisite alignment with management.

Furthermore, I do not find Boals' testimony to be impartial and objective. He admitted that he had been angry with Stallsmith for something that had occurred during the time that he worked with Stallsmith. Boals described an incident in which he had damaged one of the computerized machines by misprogramming the machine. In explaining the damage to the machine, he explained: ". . . it screwed everything up pretty bad."

The following day Stallsmith asked Boals what happened and Boals explained what occurred. Stallsmith then spoke with Die Construction Superintendent Sanor and Sanor devised a way to repair the damage. Boals admitted that he had no other knowledge as to what Stallsmith did after he learned the details of Boals' accident. Boals admitted, however, that he nevertheless became angry with Stallsmith. He believed that Stallsmith had photographed the damaged machine and left the picture for everyone in the department to see. Boals admitted, however, that he had not seen Stallsmith take the picture and he had based his suspicions only upon what other employees had told him. Boals recalled that the other employees laughed at him and made fun of him. Boals had been upset and he felt that Stallsmith had made a fool of him. Sometime after Boals damaged the machine, Furlong asked him what had happened. Boals admitted that it had been his fault.

## 4. Summary and conclusions

In its decision in Dow Chemical Co., 237 NLRB 1276, (1978), the Board dealt with the managerial status of paint inspectors. The inspectors, who were referred to as "owner representatives," were responsible for distributing work orders to the contractors' general foreman and inspecting all phases of painting performed by contractor personnel. They also coordinated the various phases of work with contractors' foremen and were responsible for meeting work schedules. The inspectors were additionally responsible for making certain that the various jobs were in accordance with the work orders and they had the authority to either accept or reject the contractors' work. If the inspector witnessed a violation of a safety rule, he had the authority to stop the work until there was compliance with the rules. Inspectors verified overtime worked by contractors' employees and reviewed and signed timesheets submitted by contractors and checked and ordered material utilized on the job. Despite the extent of authority exercised by the inspectors in controlling the flow of work and in policing and monitoring the work performance, the inspectors were not found to be managerial employees. The Board concluded that the inspectors lacked a significant degree of discretion in the performance of their jobs independent of the employer's established policy. Id. at 1277. Although the employees in issue in *Dow Chemical*, Co., exercised their authority primarily with outside contractors' supervisors and employees, they nevertheless had the requisite authority to speak for the employer and were viewed as the employer's representatives in managing and monitoring the work. Their authority was quite similar to Stallsmith's responsibilities in keeping the department machines operating at maximum efficiency with minimal waste and expense. His suggestions to the operators to modify or to improve their performance were strikingly similar to the responsibilities of the paint inspectors.

The Employer cites the Board's decision in *EDP Medical Computer Systems*, 284 NLRB 1232, 1263 (1987); asserting that the Board found the "right-hand man" of a company officer to be a managerial employee where the employee was placed in a position in which the employees could reasonably believe that he was an agent of management. While the employee in issue was found to be a managerial employee and also found to be in

a position where employees could reasonably believe him to be an agent of the employer, the circumstances of the cited case are significantly distinguishable. In EDP Medical Computer Systems, the employer stipulated that the employee in issue was a managerial employee during a representation proceeding. The employee assigned work to employees, signed checks on behalf of the employer, resolved employee problems, and effectively recommended a raise for an employee. The employee was in charge of the employer's facility on Jewish holidays and on Fridays in the absence of the principals. The employee held himself out to the public as a representative of management, using titles such as controller and assistant to the president. Finding the employee to be in an executive type position, the judge determined that he was more closely aligned with management than rank-and-file employees. With respect to how he was viewed by other employees, the judge noted that even if the employee was not found to be a managerial employee, it was clear that the respondent had placed him in a position in which employees could reasonably believe that he speaks on management's behalf. Accordingly, the judge determined that the employee in issue must be found to be an agent of the respondent. Thus, the employee in issue was found to be an agent of the employer partly because of his managerial status, rather than his being a managerial employee because of his agency status.

Although the Board has established no firm criteria for determining when an employee is sufficiently aligned with management to confirm managerial status, an employee will usually be excluded from the protection of the Act as managerial only if he represents management interests by "taking or recommending discretionary actions that effectively control or implement employer policy." NLRB v. Yeshiva University, 444 U.S. 672, 682-683 (1980). The total record evidence in this case does not reflect that Stallsmith's duties, responsibilities, or authority met this criteria. Stallsmith was actively involved in supplying the necessary tooling to the machinists and in assisting them to utilize the tooling in the most efficient and cost effective manner. As supported by Boals' testimony, machinists followed his suggestions and directions because he was more experienced. At the time of his termination, Stallsmith had worked for the Employer for over 28 years. He began as a machinist and progressed through all of the pay scales until he became the top machinist and then he finally became a lead employee in 1996. One of his primary responsibilities was to maintain the inventory of inserts. His testimony reflects that he was able to do this by monitoring how quickly the inserts were being used by the machinists. In doing so, he assisted the machinists in improving their performance and in using the right tooling. While Stallsmith's interaction with the machinists may have helped him to perform his personal job responsibilities and duties, such interaction did not constitute discretionary actions that controlled or implemented an employer policy. Thus, I do not find that Stallsmith was a managerial employee at the time of his termination.

Finding that Stallsmith was not a managerial employee at the time of his discharge, I have credited in large part the testimony of Robert Stallsmith in both the representation proceeding as well as the unfair labor practice proceeding. The Employer

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submits that Stallsmith's testimony is not credible because portions of his testimony in the representation proceeding and the unfair labor practice proceeding are contradictory. I do not find a significant variance sufficient to discredit his overall testimony. Stallsmith testified on various dates throughout the representation hearing; a proceeding that spanned a 19-month period of time. More than 5 years later, he again testified in the unfair labor practice hearing. It is not unreasonable that there would be some variance in his recall over this 7-year period of time. Any discrepancies in his testimony throughout this 7year period were minor. His overall testimony was consistent. I found him to be a forthright and credible witness. One of the most significant factors in crediting Stallsmith, however, is the fact that he was essentially uncontradicted in his testimony. Neither Furlong nor Metzger were called to testify in either the representation proceeding or the unfair labor practice proceeding. The failure to call a witness whose testimony would reasonably be presumed to favor a party warrants an adverse inference that had the individual been called as a witness, his testimony would not have supported the party's position. DMI Distribution of Delaware, Ohio, 334 NLRB 409, 412 (2001); Iron Workers Local 118 (California Erectors), 309 NLRB 808, 811 (1992); and *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987). Accordingly, inasmuch as Stallsmith was essentially uncontradicted, I credit his testimony.

There is no dispute that the Employer terminated Stallsmith because of his support for the Union. The Employer asserts that it did so because of its belief that Stallsmith was a managerial employee and thus his termination was not viewed as a violation of the Act. Additionally, Stallsmith's tape-recorded conversation with Sekely and Keene demonstrates that the Employer sought his signature on the June 2000 job description in order to also establish his supervisory status under Section 1(11) of the Act.

The Board has long held, however, that if the conduct giving rise to the employer's mistaken belief is itself protected, then the employer's erroneous actions cannot justify the employee's termination. The fact that an employer may have acted in good faith is immaterial where the activity for which the employee was discharged was actually protected by the Act. To excuse the employer because of even a good-faith mistake would materially weaken the guarantees of the Act and would allow the employer's state of mind to vary the extent of employees' protected rights. *Montgomery Ward & Co.*, 179 NLRB 686, 692 (1969). Thus, the Employer's mistaken belief that Stallsmith was a supervisor or managerial employee does not lessen the protection of the Act or excuse action that would otherwise be unlawful.

For there to be a violation of Section 8(a)(1) and (3) of the Act, the Board's guidelines in *Wright Line*, 251 NLRB 1083, (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), require the General Counsel to make a prima facie showing sufficient to support the inference that the employee's protected conduct was a "motivating factor" in the employer's decision to terminate the employee. In this instance, it is undisputed that Stallsmith supported the Union and that he was terminated because of that support. Accordingly, inasmuch as he was fully protected by the Act at the time of his

discharge, his termination violates Section 8(a)(1) and (3) of the Act. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. 988 F.2d 120 (9th Cir. 1993).

#### CONCLUSIONS OF LAW

- 1. The Employer, composed of Sekely Industries, Inc. and Solartec, Inc., is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The UAW, Region 2B is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By terminating the employment of Robert Stallsmith on July 10, 2000, the Employer violated Section 8(a)(1) and (3) of the Act.

#### REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Employer having discriminatorily discharged Robert Stallsmith, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

## ORDER

The Employer, Solartec, Inc. and Sekely, Industries, Inc., Salem, Ohio, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Discharging or otherwise discriminating against any employee for supporting the UAW, Region 2B, or any other labor organization.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, if the Employer has not already done so, offer Robert Stallsmith full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Robert Stallsmith whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Robert

<sup>&</sup>lt;sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Stallsmith, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

- (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its Salem, Ohio, facility copies of the attached notice marked "Appendix."13 Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Employer's authorized representative, shall be posted by the Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Employer has gone out of business or closed the facility involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since July 10, 2000.
- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

## **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the UAW, Region 2B, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Robert Stallsmith, full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Robert Stallsmith, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SOLARTEC, INC. AND SEKELEY INDUSTRIES, INC.

<sup>&</sup>lt;sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."